STATE OF MICHIGAN

COURT OF APPEALS

ANNE RUTH STUBBLEFIELD,

Plaintiff-Appellant,

v

EIGHT THOUSAND SIX HUNDRED ASSOCIATES LIMITED PARTNERSHIP, d/b/a BEL-AIR CENTER, MCDONALD'S CORPORATION, d/b/a DELAWARE MCDONALD'S CORPORATION, and COMMUNITY THEATRES, INC.,

Defendants-Appellees,

and

DATTA CORPORATION and ALL SEASONS MAINTENANCE,

Defendants.

UNPUBLISHED
March 7, 2000

No. 208622
Wayne Circuit Court
LC No. 95-529636-NO

Before: Jansen, P.J., and Collins and J. B. Sullivan[*], JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order of dismissal in this premises liability action. Plaintiff challenges the trial court's order requiring her to provide security for costs pursuant to MCR 2.109, as well as its ultimate dismissal of plaintiff's case on the basis that she failed to furnish the ordered bond. We affirm.

Plaintiff alleged that she was injured when she fell while crossing over a mound of snow that divided the sidewalk from the parking lot of defendant Bel-Air Center. The case was mediated and

[*] Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

evaluated at $6,500 in plaintiff's favor. Plaintiff rejected and defendants accepted the award. The trial court subsequently granted partial summary disposition to defendants. The court found that the danger posed by the snowbank was open and obvious, but that there remained a genuine issue of material fact with regard to whether the snow bank posed an unreasonable risk of harm. Defendant All Seasons Maintenance (All Seasons) filed a motion for security for costs, arguing, among other things, that the case was frivolous because the snowbank over which plaintiff allegedly fell was open and obvious. Plaintiff opposed the motion and argued that the open and obvious defense was inapplicable because plaintiff had no other way to access the parking lot than by scaling the snowbank which All Seasons created. The court concluded that security for costs was warranted and ordered plaintiff to post a bond in the amount of $6,500 on or before August 27, 1997. On October 13, 1997, defendants filed a motion for dismissal based on plaintiff's failure to comply with the order. On December 8, 1997, the trial court ruled that it would grant defendants' motion for dismissal if plaintiff failed to post the bond in fourteen days. Plaintiff did not file the bond and the case was dismissed.

Plaintiff first argues on appeal that the trial court erred in requiring her to provide a security bond because her claim has merit and because the motion for security was not timely. We review a trial court's decision to require a security bond for an abuse of discretion. *In re Surety Bond for Costs*, 226 Mich App 321, 331; 573 NW2d 300 (1997). An abuse of discretion occurs when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the trial court's ruling. *In re Condemnation of Private Property for Highway Purposes*, 228 Mich App 91, 94; 576 NW2d 719 (1998).

Pursuant to MCR 2.109, a trial court may require a plaintiff to post security for costs:

> (A) Motion. On motion of a party against whom a claim has been asserted in a civil action, if it appears reasonable and proper, the court may order the opposing party to file with the court clerk a bond with surety as required by the court in an amount sufficient to cover all costs and other recoverable expenses that may be awarded by the trial court, or, if the claiming party appeals, by the trial and appellate courts. The court shall determine the amount in its discretion. . . .
>
> (B) Exceptions. Subrule (A) does not apply in the following circumstances:
>
> (1) The court may allow a party to proceed without furnishing security for costs if the party's pleading states a legitimate claim and the party shows by affidavit that he or she is financially unable to furnish a security bond.

Security should not be required unless there is a substantial reason for doing so. *In re Surety Bond*, *supra*. A substantial reason for requiring security may exist where there is "a tenuous legal theory of liability," or "where there is good reason to believe that a party's allegations, although they cannot be summarily dismissed under MCR 2.116, are nonetheless groundless and unwarranted." *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 270; 463 NW2d 254 (1990), citing *Wells v Fruehauf Corp*, 170 Mich App 326, 335; 428 NW2d 1 (1988). If a party does not file a security bond as ordered, a court properly may dismiss that party's claim. *In re Surety Bond*, *supra*.

As an initial matter we note that the trial court did not state on the record its reasons for granting All Seasons' motion. We encourage courts to make such a record to facilitate appellate review. See *Belfiori v Allis-Chalmers, Inc*, 107 Mich App 595, 601; 309 NW2d 682 (1981). Nevertheless, our review of the record convinces us that the trial court did not abuse its discretion in requiring the security bond. Plaintiff argues that the snowbank presented an unreasonable risk of danger because plaintiff had no other "feasible option" to access the shopping center than to cross over the snowbank. While the open and obvious doctrine may suspend a business invitor's duty of care with respect to dangers known to the invitee or dangers so obvious that the invitee might reasonably be expected to discover them, the business invitor remains liable for harm arising from open and obvious dangers "if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee. . . ." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 610; 537 NW2d 185 (1995). Contrary to plaintiff's assertions, however, witnesses Derrow Sanders and William Welsh both testified that safer alternate routes to the parking lot were available to plaintiff, including paths cut through the snowbank to access nearby handicap parking and driveways into the parking lot that were cleared of snow on the day plaintiff fell. Although the trial court determined that it could only grant partial summary disposition to defendants because there remained an issue of fact with regard to whether the danger presented by the snowbank was unreasonable, given the deposition testimony of Sanders and Welsh, the court could fairly question whether plaintiff's claims were warranted. See *Hall, supra; Wells, supra.* Therefore, we cannot conclude that there was no excuse or justification for the trial court's ruling.

Plaintiff also argues that All Seasons' motion was untimely. Because plaintiff failed to raise this issue in the trial court, it is unpreserved and we decline to address it. *Driver v Hanley (After Remand)*, 226 Mich App 558, 563-564; 575 NW2d 31 (1997); *Bloemsma v Auto Club Insurance Ass'n (After Remand)*, 190 Mich App 686, 692; 476 NW2d 487 (1991).

Finally, plaintiff argues that the trial court should have waived the bond requirement because she had a legitimate claim and was financially unable to furnish a bond in the amount required by the court. Again, the waiver of a security bond under MCR 2.109(B)(1) is a matter addressed to the discretion of the lower court. *Hall, supra* at 271. Although plaintiff contends that the court erred in failing to conduct a hearing to determine whether plaintiff's claim was legitimate, because plaintiff failed to submit an affidavit, as required by MCR 2.109(B)(1), in support of her claim that she was financially unable to furnish a bond, it was unnecessary for the trial court to discuss whether her complaint stated a legitimate claim. See *Wells, supra* at 339 n 4. Given the absence of the required affidavit, we find that the trial court did not abuse its discretion in failing to waive the bond. Because plaintiff failed to furnish the bond as ordered, the trial court properly dismissed her claim. *In re Surety Bond, supra*.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan